UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRED MEYER STORES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 15-1135

PETITION FOR REVIEW OF A NATIONAL LABOR RELATIONS BOARD DECISION

Notice is hereby given this 11th day of May 2015, that Fred Meyer Stores, Inc. hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the "Decision and Order" of Respondent National Labor Relations Board issued in case number

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36-CA-010555 on April 30, 2015. A copy of the Decision and Order is attached hereto as Exhibit A.

RESPECTFULLY SUBMITTED: May 11, 2015.

BULLARD LAW

By _____
Mitchell J. Cogen, D.C. Cir. No. 55455

200 SW Market Street, Suite 1900
Portland, OR 97201
503-248-1134/Telephone
503-224-8851/Facsimile

Attorneys for Petitioner
Fred Meyer Stores, Inc.

Fred Meyer Stores, Inc. *and* United Food and Commercial Workers Local No. 555, affiliated with United Food and Commercial Workers International Union. Case 36–CA–010555

April 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On December 13, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 34. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale.[1] Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order, as modified below, to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 34, which is incorporated here by reference.[2]

As described in the now-vacated decision, the central issue is whether the Respondent unlawfully changed the parties' longstanding and contractually-based practice of allowing union representatives to have short conversations with employees on the selling floor. The parties' successive collective-bargaining agreements included the following visitation language:

> It is the desire of the Employer and the Union to avoid wherever possible, the loss of working time by employees covered by this Agreement. Therefore representatives of the Union when visiting the store or contacting employees on union business during their working hours shall first contact the store manager or person in charge of the store. All contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties.

Over the more than 20 years that the contractual access provision has been in place, the parties have established a past practice as to its interpretation and application.[3] Specifically, as found by the judge, the parties have al-

[1] Because the complaint did not allege, and the General Counsel did not contend at trial, that the Respondent's violation of the contract's visitation provision constituted a midterm modification without the Union's consent within the meaning of Sec. 8(d) of the Act, we do not pass on that issue.

[2] In the now-vacated decision, the Board inadvertently described the store's area as 165 acres, when in fact it is 165,000 square feet. We correct the error.

We shall modify the Order to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[3] The visitation provision is replicated in the Union's collective-bargaining agreements with Safeway, another multi-location grocery store chain in the Portland area, whose employees the Union represents. In 2002, the Union endorsed a memo from Safeway explaining the protocol for visitation. That memo stated:

> UFCW 555 Business A[g]ents are in our stores frequently, and especially now, during the union's elections and because of the lengthy Eugene and Salem area negotiations.
>
> Business agents in our stores have certain rights and obligations, as do we during their visits. Unfortunately, there have been a number of confrontations between store managers and business agents during the past few weeks. THE PURPOSE OF THIS MESSAGE IS TO EXPLAIN WHAT CONDUCT IS ACCEPTABLE – BY THEM AND BY US.
>
> . . . .
>
> Business agents have the right to talk BRIEFLY with employees on the floor, to tell those employees they are in the store, to introduce themselves, and to conduct BRIEF conversations, as long as the employees are not unreasonably interrupted. Such conversations should not occur in the presence of customers.
>
> Business Representatives have the right to distribute fliers to employees on the floor AS LONG AS IT IS DONE QUICKLY, THE EMPLOYEES ARE NOT URGED TO STOP WHAT THEY ARE DOING TO READ THE MATERIALS AT THAT TIME, AND FURTHER, THAT THE MATERIALS ARE NOT PASSED OUT IN THE PRESENCE OF CUSTOMERS.
>
> Business agents have the right to distribute materials in the break room. Lengthy conversations and discussions should always take place in the break room. . . . . [Emphasis in original.]

lowed union representatives to have conversations with employees on the selling floor so long as the following conditions were met: (1) the employees were not dealing with or assisting store customers at the time, and (2) the store floor conversations were kept to a reasonable length. The judge found that the parties' understanding was that a reasonable length was "a minute or two or possibly longer depending on the circumstances." The judge found that the parties did not have a clearly defined practice with regard to the number of union agents permitted to be in a store at any one time.

The events at issue took place on October 15, 2009. By then, the Respondent and the Union had been engaged for more than a year in multiemployer negotiations for a successor collective-bargaining agreement. That day, the Union sent a team of eight representatives to the Respondent's Hillsboro, Oregon facility as part of a campaign to maintain employee support during the protracted negotiations. The representatives were instructed to inform employees about the status of the negotiations, distribute fliers, and solicit signatures for a petition in support of the Union's proposals. When they arrived, Union Representatives Jenny Reed and Brad Witt, in accord with the visitation provision of the parties' collective-bargaining agreement, stopped at the store's information desk to inform the manager on duty (MOD) that they were in the store; meanwhile, the other six union representatives spread out in pairs to talk to employees.[4] After about 5 minutes, MOD Jim Dostert arrived at the information desk and informed Reed and Witt that their contact with employees on the store floor would be limited to identification and introductions and that any additional communications would need to take place in the breakroom. Reed disagreed with Dostert's instructions, and she offered to show him a copy of the parties' contractual visitation policy. Dostert declined to read or consider the policy.

Thereafter, as Dostert was on the telephone seeking instructions from the Respondent's corporate office, Reed and Witt attempted to speak with cashier Alicia England, who had no customers and was straightening a nearby display.[5] Dostert angrily and repeatedly instructed England not to speak to Reed. Dostert yelled that the union representatives were only there for employees' dues and that the employees did not need a union. He asked Reed and Witt how much money the Union had stolen from its members, added that he did not believe in unions, and ordered Reed and Witt to leave the store. Reed told Dostert she had a right to be at the store and that she did not want to pick a fight with him.

As these events were occurring, Dostert received reports from the Respondent's supervisors that other union representatives were present in the store. He then summoned store security officer Michael Kline and directed him to evict Reed and Witt from the store. When Reed and Witt cited their contractual right to be on the premises and refused to leave, Dostert instructed Kline to call the police. When the police arrived, Dostert told them he wanted Reed and Witt "out of there." Reed attempted to explain to the police why she was in the store; nevertheless, they handcuffed her and escorted her out of the store and into a police cruiser while about 10 employees looked on. Ultimately, the police charged Reed with trespassing. Shortly thereafter, Union Officer Michael Marshall and Union President Daniel Clay were arrested for refusing to leave the parking lot.[6]

The judge found, inter alia, that the Respondent violated Section 8(a)(5) and (1) by limiting the union agents' right to contact store employees and Section 8(a)(1) by telling employees not to speak to the union representatives, disparaging the Union in the presence of employees, threatening to have union representatives arrested, and causing the arrest of three union representatives. For the reasons set forth in the judge's decision and below, we agree.

The dissent argues that our decision discourages employers from entering into visitation agreements and "strips discretion from the Respondent's management to determine what will reasonably interrupt work." We disagree. Contrary to the dissent's characterization, the parties' contractual visitation provision does not vest the Respondent's management with unfettered discretion to determine what is unreasonable. And, in any event, Dostert acted unreasonably and unlawfully because his directive to Reed and Witt misstated and departed from the visitation policy, and he issued the directive with no knowledge of the purpose of their visit.

[4] The record is silent on how many customers were in the store at the time. As discussed below, the store was not particularly busy.

[5] The judge inadvertently referred to England as "Robinson."

[6] Marshall was one of the union representatives talking to employees in the store. After the police arrived, he exited the store, walked to the parking area and stood next to the vehicle in which he had received a ride to the store. The vehicle was locked, and Marshall did not have the keys. When a police officer told him to leave the premises, Marshall explained that he was waiting for the owner of the car. The police arrested Marshall. About that same time, Clay received a call about trouble at the store. He arrived at the store and told the police they should not arrest the union representatives because they had a right under the Act to be at the store. A police officer asked Dostert whether he wanted Clay there. Dostert replied that Clay had no right to be there, and the police arrested Clay as well.

The dissent also accuses the Union of staging the confrontation, a contention that is at odds with the judge's findings of fact. The visitation policy does not limit the number of representatives that may visit a store at one time, and the testimony of the Union's officers indicates that they had planned to use teams to update employees in large, multiunit stores about negotiations in order to save time. In any event, contrary to the dissent's assertion, Dostert was unaware of the presence of the other six union representatives at the time he instructed Reed and Witt to go to the breakroom and when he angrily intervened in Reed's conversation with employee England.

The dissent agrees that the Respondent violated Section 8(a)(1) of the Act when Dostert instructed England not to speak with Reed at all, describing this as "a too-absolute prohibition" that is inconsistent with the policy and past practice and noting that there was no evidence that the union representatives unreasonably interrupted England's work. The dissent fails to acknowledge, however, that there is no evidence that *any* of the other union representatives unreasonably interrupted employees' work or disrupted operations in any way.[7] Thus, his prediction that the Union's efforts would have required far more time than had been permitted in the past for floor conversations is unsupported by anything in the record. In this connection, we note that the 2002 interpretation of the policy cited above clearly allows union representatives to hold brief conversations and to distribute fliers on the store floor.

Next, the dissent argues that although the employees had a right to have their union representatives protest management's truncation of the visitation policy, the protest was subject to the limitations in the visitation policy itself. The visitation policy, however, says nothing of the sort, and the dissent's addition to the policy would create an absurd requirement that union representatives attempt to speak with employees *and* protest the Respondent's violation of the policy in the brief time allotted under the policy for conversations with individual employees. Moreover, in an attempt to bolster his characterization of the Union as overstepping its bounds, the dissent repeatedly asserts that the Union "argued" with management for 45 minutes on the shop floor. Although several witnesses described the incident as lasting 45 minutes, these accounts referred to the entire series of events, from the time the union representatives entered the store until the police handcuffed Reed and put her in the police vehicle. Reed and Witt waited at the customer service desk for 5 minutes; Dostert made three phone calls to the corporate office and received one call from the Respondent's director of human resources; Dostert summoned the store's security guard; disparaged the Union and its representatives between making those phone calls and while speaking on the phone; and approximately 15 minutes elapsed from the time the police handcuffed Reed until they put her in the patrol car. Also covered in that 45-minute period was the police's arrest of Union Representative Marshall while he waited in the parking lot for the union representative with whom he had carpooled to unlock the vehicle, and the arrest of Clay when he arrived to assist his colleagues. Thus, any "argument" between Dostert and union representatives on the shop floor occupied only a fraction of the 45-minute period. And again, during all of this time, there is no evidence that any customer was ignored or that store operations were otherwise disrupted. Indeed, the only "confrontation" was caused by Dostert's misguided interpretation of the contractual visitation policy, his angry admonitions that employee England and Reed not speak to each other, and his disparaging remarks about the Union.

Last, relying on the First Amendment and Section 8(c) of the Act, the dissent would reverse the judge's finding that Dostert's disparagement of the Union and its representatives was unlawful. The First Amendment, with few restrictions, permits citizens to voice their opinions in word and deed. Section 8(c) protects "the expressi[on] of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form . . . if such expression contains no threat of reprisal or force or promise of benefit." Employers and their agents are generally free to express their views about unionization, even vituperatively, and "[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." See *Turtle Bay Resorts*, 353 NLRB 1242, 1278–1279 (2009), and cases cited therein, incorporated by reference in 355 NLRB 706 (2010). Nevertheless, such statements must be considered in context, not in isolation, and disparaging statements uttered in the context of the commission of unfair labor practices or in response to protected concerted activity may rise to the level of unlawful threats. Id. In *Turtle Bay*, for example, a manager's disparaging remarks about a union representative, made when he accosted her in a cafeteria in the presence of employees and threatened to discipline any employee

[7] There is no evidence that the presence of the eight union representatives caused any disruption of operations in the 165,000 square foot facility. The union representatives arrived at about 9:30 a.m. on a weekday, when the store was not busy, and spread out to speak with employees. They did not move as a group within the store. That England was straightening a display rather than attending to customers when Dostert prohibited her from speaking with Reed and Witt supports our inference that the visit occurred at an offpeak hour and that no disruption of customer service occurred.

who spoke with her, were found to have violated Section 8(a)(1). See also *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 474 (1995), enfd. in pertinent part 97 F.3d 65 (4th Cir. 1996) (employer violated the Act by making disparaging remarks about the union in the context of other coercive statements).

Here, Dostert, the manager in charge of the store, engaged in an angry tirade against the Union and its representatives—fuming in front of at least one employee that the employees did not need a union and accusing the Union of stealing from the employees, while unlawfully abridging the visitation provision, preventing England and Reed from talking, and calling the police to arrest them. We agree with the judge that Dostert's remarks, uttered in connection with his unlawful denial of the of the union representatives' visitation rights, his unlawful order to an employee not to speak with a union representative, his unlawful threats to have union representatives arrested, and the unlawful expulsion and arrest of union representatives, had a reasonable tendency to coerce employees and interfere with their exercise of Section 7 rights.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and directs that the Respondent, Fred Meyer Stores, Inc., Hillsboro, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the judge's recommended Order as modified.

1. Insert the following as paragraphs 2(a) and (b) and reletter the remaining paragraphs.

"(a) Rescind the unilateral change in the parties' practice limiting the union representatives' contractual right to contact represented store employees, and notify the Union in writing that this has been done.

"(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining units:

The Grocery, Produce, and Delicatessen (Grocery) Unit:

All employees within the jurisdiction of United Food & Commercial Workers' Union Local 555, covered by the wage schedules and classifications listed in the collective-bargaining agreement (head clerk/head produce clerk, journey person clerk, apprentices, courtesy clerks, demonstrators, container clerks employed in the grocery, produce and delicatessen departments), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Combined Checkout (CCK) Unit:

All employees employed in the Respondent's combination food/non-food check stand departments in all present and future combination food/non-food check stand departments in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Retail Meat Unit:

All employees covered by the wage schedules and classifications listed in the collective-bargaining agreement (head meat cutter, journeyperson meat cutter, apprentices, journeyperson meat wrapper, lead person, journeypersons employed in the retail meat, service counter/butcher block, and service fish departments), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Non-Food Unit:

All employees within the jurisdiction of United Food & Commercial Workers Union Local 555, covered by the wage schedules and classifications listed in the collective-bargaining agreement (general sales, store helper clerks, salvage, pharmacy tech A, lead clerks, PICs), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 30, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting in part.

It is the mission of this agency to serve the public's interest in maintaining and promoting labor peace, an obli-

gation we fulfill in large part by respecting agreements between employers and employee representatives meant to foster good relations and minimize disruptions to commerce. The access-visitation policy at issue here is such an agreement, providing for brief, nondisruptive visits between employees and their representatives during working time that do not "unreasonably interrupt" employees, and thus balancing employee interests with the employer's prerogative to maintain production. Unfortunately, the underlying decision, and today's affirmation of its holding, sends the counterproductive message to employers that they should refuse to agree to such policies, particularly if they rely, as they must, on any sort of reasonableness standards. Here, the Board has expanded an agreement permitting "brief" working time conversations between employees and their representatives into one providing an essentially unlimited-duration access right, and throws off any balancing of rights that animated the agreement by essentially stripping the Employer of discretion to determine what is an unreasonable interruption of work. The decision is a disincentive to employers contemplating such beneficial access policies and fails to contribute to our mission of promoting labor peace.

At the outset, I do agree with my colleagues on one point: that the Respondent violated Section 8(a)(1) of the Act by telling employee Alicia England not to talk to her union representatives on the shop floor *at all*. This too-absolute prohibition was inconsistent with the parties' visitation policy and past practice, and there is no evidence that the union representatives unreasonably interrupted England's work.

That violation, however, did not spawn a Section 7 right of the union representatives to persistently argue with a manager for a good 45 minutes on the shop floor, nor to refuse both his and police officers' orders to leave. I also agree with former Member Hayes that the nonemployee union representatives' planned visit and efforts to educate and obtain petition signatures from employees while on the shop floor far exceeded the scope of past visits and, by the same measure, the scope of the Act's protection. Accordingly, aside from the above violation, I would dismiss the other allegations in agreement with former Member Hayes' dissent.

Turning to the visitation policy, it states that "[a]ll contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties." Nothing in the policy strips discretion from the Respondent's management to determine what will reasonably interrupt work. And no employer would agree to such a reasonable provision if it thought it meant ceding such a basic managerial prerogative. Nor does the past practice define a limit to the Respondent's discretion to deal with the planned confrontation here, where the Union sought to force the Respondent to put up with its petitioning of employees *while they were working*, far exceeding the low-key visits of the past. Thus, eight representatives descended on the store with petitions (and, yes, contrary to the majority, Manager Jim Dostert did become aware of this during the confrontation with the union representatives, as he was receiving calls from other managers informing him of what was going elsewhere in the store). The Union's representatives had come to the store ostensibly to educate employees about the Union's bargaining proposals and the state of negotiations with the Employer, to seek support from employees about those proposals, to have employees read the petition language, and to secure employee signatures on those petitions. All of this was to occur while the employees were performing their work. Further, a union representative had threatened the day before to cause a confrontation, and the Union clearly intended to discover what sort of activity they could get away with in the name of the visitation policy. As former Member Hayes observed, the Union's efforts would have required far more than the 1-to-2-minute conversations permitted in the past.[1] The Respondent here was reasonably apprehensive that the Union sought to create a dispute in the store that quite obviously exceeded the scope of past visits. Consequently, the Respondent was well within its rights when it tried to minimize disruption by directing union representatives to the breakroom, by eventually ordering the obstreperous nonemployee representatives out, and by calling police.[2]

[1] Even where the Union had brought flyers in the past, employees were directed to read them while on break.

[2] The undisputed testimony is that, the day before, representatives visited the store, and a manager asked a union representative not to interrupt an employee who was working at the time the representative was trying to talk to her. An argument ensued, the store manager joined the exchange, and the union representative—according to the Employer's witness—became angry and threatened to bring 15 to 20 more union representatives into the store the next day. Thus, we know there was a confrontation, there was a perception that the union representatives were planning to stage a confrontation quite obviously beyond the bounds of any agreement or the rights protected by the Act, and the reported threat of a confrontation by the Union reasonably spurred the Employer to discuss appropriate responses with its managers in the event such a confrontation did occur as threatened. Hence, managers including Dostert were well on guard for trouble by the time the Union returned representatives to the store the next day with planned activity that far exceeded past practices (at the least, petitioning and discussing bargaining positions—a somewhat involved topic—on the shop floor). Moreover, Dostert was being called by managers seeking advice on handling the union representatives elsewhere in the store. My colleagues make much of their claim that Dostert did not know precisely what the union representatives were doing at the time, but that is irrelevant to whether their activity was protected and whether he interfered

I agree with my colleagues that the unit employees had a Section 7 right to have their representatives protest a management decision on their behalf. But that is subject to the previously agreed-upon limits to the nonemployee representatives' access. Thus, any Section 7 rights at issue here were constrained to (a) a brief protest, as the parties' contract does NOT provide an unlimited-duration access right but, on the contrary, a "brief" right of conversation,[3] and (b) grieving the matter under the appropriate contract provision if there is a continuing dispute. Any right to protest the purported curtailment of the past practice cannot logically itself exceed what that past practice would allow and still retain the Act's protection. Here, the representatives' statutory right to remain evaporated after a few minutes of arguing and well before the Respondent ordered them to leave and called police. The Act did not require the employer to tolerate lengthy disruptive arguments and conversations on the shop floor and repeated refusals to leave, nor did it require police to tolerate refusals to abide their orders.[4]

My colleagues also err by their further finding that Dostert unilaterally changed terms and conditions of employment by telling union representatives to talk to employees in the breakroom. Even assuming for the sake of argument that this one-time situation amounted to a contract breach, which is not alleged, it did not reflect any sort of policy change to establish an 8(a)(5) unilateral change. There was no *change* because the policy apparently had not been tested in this way before. Thus, sending the union representatives to the breakroom in response to a union-orchestrated confrontation wholly dissimilar from anything that had occurred in the past is hardly a *change* to working conditions. The matter is appropriate for a grievance and arbitration process by which the limits of the policy can be clarified, not an 8(a)(5) allegation.

Finally, my colleagues also find that Manager Dostert unlawfully disparaged the Union. This finding illustrates this Agency's persistent failure to grasp fairly basic First Amendment law and strays from the express language of Section 8(c) of Act. Manager Dostert expressed his opinion to England that union representation was unnecessary and outdated, and that union representatives were stupid, stealing employees' dues money, and worthless (slightly different language than the complaint alleges). Each an obvious personal opinion. Section 8(c) provides that the expressing of *any views*, argument, or opinion shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act if such expression contains no threat of reprisal or force or promise of benefit. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Flip and intemperate expressions of personal opinion are both constitutionally—and statutorily—protected speech. *Sears, Roebuck & Co.*, 305 NLRB 193 (1991) (respondent did not violate the Act by telling employees that the union might send someone to break their legs to collect dues). Section 8(c) protects a respondent's characterization of a union, which employees are quite capable of evaluating for themselves. *Fayette Cotton Mill*, 245 NLRB 428 (1979). As *Sears* shows, statements can be far less innocuous than were Dostert's mild abrasions to the Union's integrity without losing protection. Dostert's statements contained no threats and are obviously expressions of opinion that he is entitled to have and share. The majority errs (dramatically, in my view) by finding that his comments were rendered unlawful by their mere *proximity* to other unfair labor practices, although the comments themselves *contained* no threat, express or implied. This virus-type theory by which unlawful conduct apparently infects mere statements of opinion and morphs them into implied threats is a work around of basic First Amendment

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with the exercise of Sec. 7 rights. I find that the union visitors had exceeded the boundaries established by the policy and past practice and were not engaged in protected activity. Accordingly, even if Dostert did not know precisely what was going on, he did not interfere with *protected* activity. But I find that he acted reasonably and lawfully based on what he knew, what he indisputedly and reasonably anticipated, and in accord with the Employer's right to maintain order in its store.

[3] As the majority notes, the Union endorsed a 2002 employer memorandum concerning acceptable store visit conduct. That document underscored the expectation that visits by union agents with employees would be brief, e.g., "Business agents have the right to talk BRIEFLY with employees on the floor, to tell those employees they are in the store, to introduce themselves, and to conduct BRIEF conversations, as long as the employees are not unreasonably interrupted." See majority opinion, supra (capitalizations from original memorandum).

[4] Based on some guesswork and estimations, my colleagues dispute that Union Agents Brad Witt and Jenny Reed actually argued for a full 45 minutes with management. Unfortunately, my colleagues miss the point here. It is undisputed that, until the very end of the incident, the six other union agents remained in the store. Even if the time spent during the Witt-Reed argument with management might have been less than 45 minutes for each one of those two union agents, the cumulative amount of disruption caused by the eight agents during the overall encounter was far more than 45 minutes. The majority's belief that no disruption occurred is simply belied by both the commonsense consequences of what happens when eight people commence simultaneous solicitation in a department store for this length of time and also by the record evidence. For example, Union Agent Reed described the entrance of the store, at the incident's conclusion, as "a scene of confusion" that included "customers trying to leave the store." 359 NLRB No. 34, slip op. at 14 (2012).

principles and does not comport with the express statutory language that only permits us to find speech unlawful if it *contains* a threat or promise. The comments here did not, and this allegation too should be dismissed.

Dated, Washington, D.C. April 30, 2015

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT direct our union-represented employees not to speak to union representatives on the store floor.

WE WILL NOT tell union representatives visiting our represented stores not to talk to union-represented employees on the store floor.

WE WILL NOT tell union representatives visiting our represented stores they must go to the employee breakroom in order to speak with represented employees.

WE WILL NOT disparage or criticize United Food and Commercial Workers Local No. 555, affiliated with United Food and Commercial Workers International Union (the Union) or the visiting union agents in our stores in the presence of our employees by stating variously that union representation was unnecessary and outdated, that the Union and its representatives were stupid, stealing employees' dues moneys, and/or were otherwise without value or worth.

WE WILL NOT threaten union representatives visiting our represented stores that we will have them arrested or removed from the store because they would not restrict their conversations with represented employees to the store employee breakroom.

WE WILL NOT instruct our store security officers to contact the police to have the union representatives arrested or removed from the store because the union representatives would not restrict their contract with represented employees to the store employee breakroom.

WE WILL NOT cause the arrest of union representatives, including Union Agents Jenny Reed, Michael Marshall, and Daniel Clay, because they refused to leave, or were not sufficiently rapid in attempting to leave, our Hillsboro, Oregon store and parking lot.

WE WILL NOT cause the criminal prosecution for trespass of union representatives, including Union Agents Reed, Marshall, and Clay, because they refused to leave, or were not sufficiently rapid in attempting to leave, the Respondent's Hillsboro, Oregon store and parking lot.

WE WILL NOT fail and refuse to bargain collectively with the Union as the exclusive bargaining representative of our employees in the bargaining units of employees described below by denying union agents access to our represented store employees on the store floor in a manner consistent with our contracts' terms and our practice of applying said terms without prior notice to the Union and without affording the Union the opportunity to bargaining with respect to this conduct and the effects of this conduct.

WE WILL NOT in any other like or related manner restrain or coerce employees in the exercise of the rights listed above.

WE WILL rescind the unilateral change in the parties' practice limiting the union representatives' contractual right to contact represented store employees, and notify the Union in writing that this has been done.

WE WILL notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining units before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees:

The Grocery, Produce, and Delicatessen (Grocery) Unit:

All employees within the jurisdiction of United Food & Commercial Workers' Union Local 555, covered by the wage schedules and classifications listed in the collective-bargaining agreement (head clerk/head produce clerk, journey person clerk, apprentices, courtesy clerks, demonstrators, container clerks employed in the grocery, produce and delicatessen departments), for all our present and future stores in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Combined Checkout (CCK) Unit:

All employees employed by us in our combination food/non-food check stand departments in all present and future combination food/non-food check stand departments in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Retail Meat Unit:

All employees covered by the wage schedules and classifications listed in the collective-bargaining agreement (head meat cutter, journeyperson meat cutter, apprentices, journeyperson meat wrapper, lead person, journeypersons employed in the retail meat, service counter/butcher block, and service fish departments), for all our present and future stores in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Non-Food Unit:

All employees within the jurisdiction of United Food & Commercial Workers Union Local 555, covered by the wage schedules and classifications listed in the collective-bargaining agreement (general sales, store helper clerks, salvage, pharmacy tech A, lead clerks, PICs), for all our present and future stores in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

WE WILL make the Union or Union Agents Reed, Marshall, and Clay, as the case may be, whole for any and all legal, representational, and related costs arising from the Reed, Marshall, and Clay arrests and any and all related, subsequent proceedings, with interest compounded daily on the amounts due.

WE WILL notify the appropriate law enforcement and court authorities of the illegality of the arrests of Reed, Marshall, and Clay on October 15, 2009, and WE WILL seek the expungement of associated official records and, further, WE WILL, within 3 days of our actions, notify the Union and Reed, Marshall, and Clay that this has been done.

FRED MEYER STORES, INC.

The Board's decision can be found at www.nlrb.gov/case/36-CA-010555 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on May 11, 2015 I served the foregoing PETITION FOR REVIEW OF A NATIONAL LABOR RELATIONS BOARD DECISION on:

John S. Bishop
McKanna Bishop Joffe & Sullivan
1635 NW Johnson Street
Portland, OR 97209

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

John Fawley
Counsel for the Acting General Counsel
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174-1078

Helena A. Fiorianti
Counsel for the Acting General Counsel
National Labor Relations Board, Region 19
1220 SW Third Ave, Suite 605
Portland, OR 97204

by mailing to the above two (2) full and correct copies thereof.

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I further certify that I filed the foregoing PETITION FOR REVIEW OF A NATIONAL LABOR RELATIONS BOARD DECISION with:

Clerk's Office
US Court of Appeals for the District of Columbia Circuit
333 Constitution Avenue, N.W., Room 5523
Washington, D.C. 2001

by Federal Express overnight delivery, the original and four (4) true and correct copies thereof.

I further certify that said copies were contained in a sealed envelope or package with fees or postage thereon prepaid, addressed as above stated, the last-known address of said party, and deposited with Federal Express and/or the post office at Portland, Oregon.

Mitchell J. Cogen, D.C. Cir. No. 55455

200 SW Market Street, Suite 1900
Portland, OR 97201
503-248-1134/Telephone
503-224-8851/Facsimile

Attorneys for Petitioner
Fred Meyer Stores, Inc.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRED MEYER STORES, INC., Petitioner, v. **NATIONAL LABOR RELATIONS BOARD,** Respondent.	No. 15-1135 **PETITIONER'S CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the Circuit Rules of this Court, Petitioner Fred Meyer Stores, Inc. declares as follows:

1. Fred Meyer Stores, Inc. is an Ohio corporation and a wholly-owned subsidiary of the Kroger Company.

2. No other publicly held company owns 10% or more of Fred Meyer Stores, Inc.

3. The Kroger Company, an Ohio corporation, has its principal place of business in Ohio and is publicly held. No other publicly held company owns 10% or more of the company's stock.

RESPECTFULLY SUBMITTED: May 11, 2015.

BULLARD LAW

By _____
Mitchell J. Cogen, D.C. Cir. No. 55455

200 SW Market Street, Suite 1900
Portland, OR 97201
503-248-1134/Telephone
503-224-8851/Facsimile

Attorneys for Petitioner
Fred Meyer Stores, Inc.

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